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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-1909

No. 75-[redacted]

WILLIAM LUCAS and
THE HONORABLE HENRY HEADING,
Cross-Petitioners,

v

SEANARFIS RIVERS,
Cross-Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. 75-6792

WILLIAM LUCAS and
THE HONORABLE HENRY HEADING,
Cross-Petitioners,
v
SEANARFIS RIVERS,
Cross-Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit, *Rivers* v. *Lucas*, February 20, 1976, not reported, appears in Appendix A, Page 21 [hereinafter *Rivers* v. *Lucas*, Court of Appeals Order, February 1976]. The judgment of the Court of Appeals, May 25, 1976, denying Cross-Petitioners' timely petition for rehearing with a suggestion for rehearing en banc, not reported, appears in Appendix B, Page 22 [hereinafter *Rivers* v. *Lucas*, Court of Appeals Order, May 1976].

The District Court Order and the accompanying memorandum opinion, May 7, 1975, not reported, appear in Appendix C, Page 24 [hereinafter, *Rivers* v. *Lucas*, District Court Order, May 1975]. Previous opinions in the instant case also appear in the Appendix: *Lucas* v. *Rivers*, 414 U. S. 896 (1973), Appendix D, Page 27; *Rivers* v. *Lucas*, U.S. Court of Appeals for the Sixth Circuit, unpublished order, No. 72-1792, December 10, 1973, Appendix E, Page 28 [hereinafter *Rivers* v. *Lucas*, Court of Appeals Order, December 1973]; *Rivers* v. *Lucas*, 477 F.2d 199 (6th Cir.), vacated, 414 U.S. 896 (1973), Appendix F, Page 29; *Rivers* v. *Lucas*, 345 F. Supp. 718 (E.D. Mich. 1972), Appendix G, Page 37.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 20, 1976, affirming the Federal District Order of May 7, 1975. On May 25, 1976 the Court of Appeals denied a timely petition for rehearing with a suggestion for rehearing en banc. This petition for certiorari was filed within 90 days of that latter ruling.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where a Defendant has succeeded on appeal in overturning his plea bargain conviction to a lesser offense, does the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the States via the Fourteenth Amendment, bar the State from bringing him to trial on the original more serious charge.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, U.S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, U.S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . .

STATEMENT OF THE CASE

On October 19, 1970 Seanarfis Rivers, Cross-Respondent herein, was charged, in an information filed in the Recorder's Court for the City of Detroit with the offense of murder in the first degree in perpetration of a larceny (Michigan Compiled Laws 1948, 750.316 as amended by PA 1969 No. 331 (Appendix H, Page 39).

Cross-Respondent Rivers was not charged with being the actual killer. On January 19, 1971, Cross-Respondent Rivers entered a plea of guilty to the lesser offense of manslaughter. On February 9, 1971, Cross-Respondent Rivers was sentenced to imprisonment for not less than fourteen years nor more than fifteen years.

On June 28, 1971, the Recorder's Court judge denied Cross-Respondent Rivers' Motion to Set Aside Plea of Guilty and for a New Trial. On that same date Cross-Respondent Rivers filed a Claim of Appeal in the Michigan Court of Appeals.

On March 23, 1972, the Michigan Court of Appeals reversed the plea conviction of Cross-Respondent Rivers because he had not been adequately advised of his federal constitutional rights by the trial judge prior to acceptance of the plea. The Court of Appeals remanded the cause to the Recorder's Court for further proceedings.

On April 18, 1972, Cross-Respondent Rivers filed with the Recorder's Court a Motion to Quash Information or to Reduce Charge to Manslaughter. This motion was denied on May 11, 1972. Both the Michigan Court of Appeals and the Michigan Supreme Court denied Cross-Respondent Rivers' subsequent motions for a stay and leave to appeal, May 15, 1972 and May 18, 1972, respectively.

On May 23, 1972, Cross-Respondent Rivers filed Application for a Writ of Habeas Corpus in the United States District Court, Eastern District of Michigan, Southern Division, pursuant to which the Honorable John Feikens on June 14, 1972 ordered that the Cross-Respondent be released from custody unless the State reduced the charge on the information to no more than manslaughter. *Rivers* v. *Lucas*, 345 F. Supp. 718 (E.D. Mich. 1972) (Appendix G, Page 37). That order

was affirmed by the United States Court of Appeals for the Sixth Circuit on April 24, 1973. *Rivers* v. *Lucas*, 477 F.2d 199 (6th Cir., 1973) (Appendix F, Page 29).

In *Lucas* v. *Rivers*, 414 U.S. 896 (1973), this Court granted Cross-Petitioner's petition for certiorari, vacated the Court of Appeals judgment, and remanded to the Court of Appeals for consideration of the question of mootness in light of the Michigan Supreme Court decision in *People* v. *McMiller*, 389 Mich. 425, 208 N.W.2d 451, *cert. denied*, 414 U.S. 1080 (1973).

On remand, the Court of Appeals determined that the only issue on appeal had become moot as a result of *People* v. *McMiller*, *supra*, and thereupon ordered the appeal dismissed pursuant to Rule 8, Rules of the Sixth Circuit. *Rivers* v. *Lucas*, Court of Appeals Order December 1973 (Appendix E, Page 28).

On April 11, 1975, Cross-Petitioners filed a Motion for Clarification of Status in the United States District Court for the Eastern District of Michigan seeking official confirmation of their belief that the 1972 district court order had been mooted by the subsequent actions of the United States Supreme Court and the Court of Appeals.

On April 15, 1975, Cross-Respondent filed a new petition for a Writ of Habeas Corpus with the District Court.

On May 7, 1975, Judge Feikens, responding both to the motion by Cross-Petitioners, and the second habeas corpus petition filed by Cross-Respondent held that the 1972 order continued to be viable, and "ordered that Petitioner be released from all custody unless the People reduce the charge on the information . . . to not more than manslaughter and commence trial on such information within ninety days." *Rivers* v. *Lucas*, District Court Order, May 1975 (Appendix C, Page 23).

On February 20, 1976, the Court of Appeals affirmed the District Court order of May 7, 1975. *Rivers* v. *Lucas*, Court of Appeals Order, February 1976, (Appendix A, Page 21). On May 25, 1976, the Court of Appeals denied a timely petition for rehearing with a suggestion for rehearing en banc; Judges Celebrezze and McCree voted in favor of rehearing en banc. *Rivers* v. *Lucas*, Court of Appeals Order, May 1976 (Appendix B, Page 22).

The basis for federal jurisdiction in the United States District Court for the Eastern District of Michigan, Southern Division, was asserted by Respondent and found by the District Court to be habeas corpus jurisdiction under 28 U.S.C. 2254.

REASONS FOR GRANTING THE WRIT

I. SINCE SUBSEQUENT FEDERAL AND STATE COURT DECISIONS ESTABLISH THAT THE ISSUE REMANDED BY THIS COURT FOR CONSIDERATION OF MOOTNESS IN *LUCAS* v. *RIVERS*, 414 U.S. 896 (1973), IS NOT MOOT, THIS COURT SHOULD NOW DECIDE THAT ISSUE: WHETHER THE SIXTH CIRCUIT COURT OF APPEALS HAS ERRONEOUSLY INTERPRETED THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION IN HOLDING THAT A STATE DEFENDANT WHO SUCCESSFULLY OVERTURNS HIS PLEA BARGAIN CONVICTION TO A LESSER OFFENSE IS IMMUNE FROM PROSECUTION ON THE ORIGINAL CHARGE.

The original 1972 district court order, relied on the precedent of *Mullreed* v. *Kropp*, 425 F.2d 1095 (6th Cir., 1970), in holding that cross-petitioners could not bring

cross-respondent to trial on an offense more serious than that to which he plead guilty:

> In *Mullreed* v. *Kropp*, *supra*, the United States Court of Appeals held that when a plea to a lesser included offense is accepted, this constitutes a deliberate decision by the State to relinquish its right to proceed on the greater charge and jeopardy attaches. *Rivers* v. *Lucas*, 345 F. Supp. 718, 719 (E.D. Mich. 1972).

The Court of Appeals affirmed the district court and reaffirmed *Mullreed* v. *Kropp*, *supra*, in *Rivers* v. *Lucas*, 477 F.2d 199 (6th Cir.), vacated, 414 U.S. 896 (1973):

> We affirm that there is implicit in a Court's acceptance of a plea to an included offense a determination that the right to prosecute the defendant on the more serious offense with which he is charged has been relinquished. The effect of the entire transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge.
>
> . . . .
>
> We continue to adhere to our decision in *Mullreed* v. *Kropp*, *supra* [425 F.2d 1095 (6th Cir., 1970)], *Rivers* at 202-203.

When this Court vacated that judgment in *Lucas* v. *Rivers*, 414 U.S. 896 (1973), and remanded for consideration of mootness in light of *People* v. *McMiller* 389 Mich. 425, 208 N.W.2d 451 (1973), the Court

of Appeals held that the issue on appeal, the challenge of that court's interpretation of the double jeopardy clause, was moot since *People* v. *McMiller*, *supra*, had held "that as a matter of policy that the State may not charge a defendant in a criminal case who has pleaded guilty to a lesser offense included in the indictment and thereafter successfully appealed the judgment based on such guilty plea, with a higher offense arising out of the same transaction." *Rivers* v. *Lucas*, Court of Appeals Order, December 1973. (App. E, P. 28)

A. SUBSEQUENT MICHIGAN DECISIONS

Although in 1973 both the Sixth Circuit's double jeopardy-based protections and the Michigan policy-based protections applied to every successful appellant from a plea bargain conviction to a lesser offense, two subsequent Michigan Supreme Court decisions have withdrawn the *McMiller* protections from certain successful appellants for whom relief continues to be available in the federal courts within the Sixth Circuit.

In *People v. Draine*, 391 Mich. 820 (1974), the Michigan Supreme Court, without discussing *People v. McMiller*, *supra*, issued this memorandum opinion:

> "Upon remand if defendant-appellant desires to [again] tender a plea of guilty to the . . . offense of assault with intent to do great bodily harm less than murder, he may do so. If defendant-appellant does not wish to so plead, or the . . . judge is unable to accept defendant-appellant's plea to said charge, the cause may proceed to trial upon the charge set forth in the original information charging second degree murder." *Draine* at 820.

That disposition, permitting the prosecutor to proceed to trial on the original charge if the defendant refused to plead again to the lesser offense, is in direct conflict with the Court of Appeals holdings in *Mullreed v. Kropp*, *supra*, and *Rivers v. Lucas*, *supra*.

In *In Re Guilty Plea Cases*, 395 Mich. 96, 235 N.W.2d 132 (1975) the Michigan Supreme Court discussed *People v. McMiller*, *supra*, and then proceeded to withdraw some of its protective coverage:

> "If the prosecutor calls the Court's attention to plea-taking error before the plea is accepted, *McMiller* will not apply in the event the trial court vacates the plea on defendant's motion or with defendant's consent, or the trial court is reversed on appeal on the basis of the same error." *In re Guilty Plea Cases*, 395 Mich. 96, 235 N.W.2d 132, 148 (1975).

Thus, *In Re Guilty Plea Cases*, *supra*, fails to provide *McMiller* protections to a successful appellant from a plea bargain conviction where the prosecutor has pointed out the plea-taking error to the Court before the plea has been accepted. However, although Michigan law would now permit the prosecutor to proceed against the successful appellant on the original more serious charge in the aforementioned situation, to do so would conflict with Sixth Circuit precedent.

B. SUBSEQUENT FEDERAL COURT PROCEEDINGS IN *RIVERS v. LUCAS*

In 1975, Cross-Respondent Rivers having refused to plead guilty again to manslaughter, Cross-Petitioners sought to proceed to trial on the original charge on the basis of *People* v. *Draine*, *supra*. However, when Cross-Repondent threatened to have Cross-Petitioners held in contempt for violating the 1972 District Court order, which Cross-Petitioners had assumed to have been mooted by the subsequent actions of this Court and the Court of Appeals, Cross-Petitioners filed a Motion for

Clarification in the District Court. On May 7, 1975, the District Court held that its 1972 order was still binding. *Rivers v. Lucas*, District Court Order, May 1975. (App. C, P. 23)

At the appellate argument before the Court of Appeals on February 12, 1976, Presiding Judge Wade H. McCree informed counsel that it was the unwritten policy of the Sixth Circuit to follow the precedent of previous panels, and that *Mullreed v. Kropp, supra*, was binding precedent in the instant case. Judge McCree advised counsel that a petition for rehearing with a suggestion for rehearing en banc was the appropriate procedure for seeking a review of the *Mullreed* precedent. Cross-Petitioners' timely petition for rehearing with a suggestion for rehearing en banc was denied by the Court of Appeals on May 25, 1976; Judges Celebrezze and McCree voted in favor of the rehearing en banc. *Rivers* v. *Lucas*, Court of Appeals Order, May 1976. (App. B, P. 22)

Thus, the issue previously before this Court can no longer be considered moot for the following reasons:

1. The 1975 district court order held that the 1972 order continues to be binding on Cross-Petitioners. The Court of Appeals continues to apply the double jeopardy clause protections developed in *Mullreed* v. *Kropp, supra*.

2. Michigan court decisions no longer provide the same comprehensive protections provided by the Sixth Circuit.

These reasons justify the grant of certiorari to review the judgment below.

II. THE SIXTH CIRCUIT PRECEDENT ON WHICH THE INSTANT ORDER IS BASED CONFLICTS WITH DECISIONS OF THREE COURTS OF APPEAL.

The 1975 District Court Order, *Rivers* v. *Lucas*, District Court Order, May 1975, reaffirmed the continued vitality of the 1972 District Court Order, *Rivers* v. *Lucas*, 345 F. Supp. 718 (E.D. Mich., 1972), which had relied on the precedent of *Mullreed* v. *Kropp*, 425 F.2d 1095 (6th Cir., 1970).

Whether or not *Rivers* v. *Lucas*, 477 F.2d 199 (6th Cir.), vacated 414 U.S. 896 (1973), continues to be viable precedent is not crucial, because *Mullreed* v. *Kropp, supra*, remains as binding precedent in the Sixth Circuit.

Mullreed held that the double jeopardy clause would be violated if a successful appellant from a plea bargain conviction to a lesser offense were permitted to be tried on the original more serious charge.

This unique Sixth Circuit extension of double jeopardy clause protections conflicts with decisions of three other federal courts of appeal.

The Second, Seventh and Tenth Circuit Courts of Appeal have declined to limit the prosecution on remand to proceeding on the plead-to lesser offense after a defendant's successful appeal of his plea bargain conviction. Two of the Circuits, the Seventh and the Tenth, have specifically rejected a claim of double jeopardy, while the Second Circuit resolved this situation on due process grounds.

In *United States* v. *Anderson*, 514 F.2d 583 (7th Cir., 1975), the Court of Appeals for the Seventh Circuit

specifically rejected the Sixth Circuit's application of the double jeopardy clause to this situation:

> "We believe that the Sixth Circuit's position is incorrect and refuse to follow it . . . . To hold otherwise is to find that the Double Jeopardy Clause gives the defendant more the 'benefit of his bargain' and ensures that he will not even be placed in jeopardy once under certain circumstances." *United States* v. *Anderson*, supra, at 587.

In *Ward* v. *Page*, 424 F.2d 491 (10th Cir., 1970), *cert. denied*, 402 U.S. 914 (1971), the Court of Appeals for the Tenth Circuit similarly refused to apply double jeopardy clause protections to the remand after a successful appeal from a plea bargain conviction to a lesser offense:

> "It is true that a guilty plea is as final as a jury verdict, but the double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical . . . . Without having been acquitted on the greater offense, neither *Benton* [v. *Maryland*, 395 U.S. 784 (1969)] nor *Booker* [v. *Phillips*, 418 F.2d 424 (10th Cir., 1969)] precludes retrial in this case on the greater offense and appellant's double jeopardy argument must fail." *Ward* at 493.

In *United States ex rel. Williams* v. *McMann*, 436 F.2d 103 (2d Cir., 1970), *cert. denied*, 402 U.S. 914 (1971), after the defendant withdrew his plea to a lesser offense, he was convicted at trial on the more serious original charge and was given a more severe sentence. After rejecting the defendant's due process claim that he could not be given a more severe sentence, the Court stated

that apart from due process grounds, it was necessary to reject defendant's claim to preserve plea bargaining:

> "For us to hold that one in Williams' position may not be tried and sentenced upon the charge originally brought would encourage gamesmanship of a most offensive nature . . . . Indeed any reason the defendant could conceive for setting aside his plea and sentence would lose him little. If the Defendant's argument were to prevail, then a trial on the lesser charge only could result . . . . This is nothing more than a 'heads-I-win-tails-you lose' gamble. To frustrate this strategy, prosecutors would be restrained from entering plea bargains, thereby adding further to the staggering burdens of our criminal courts, and judges would become more rigid in exercising their discretion in favor of permitting withdrawal of a guilty plea. This would hardly enhance the administration of criminal justice." *Id.* at 106-107.

Further evidence of federal court conflict with the Sixth Circuit is *Harris* v. *Anderson*, 364 F. Supp. 465 (W.D.N.C., 1973), where a district court in the Fourth Circuit rejected a defendant's claim that the double jeopardy clause prevented the state from prosecuting him on the more serious original charge after he withdrew his guilty plea to a lesser offense.

These aforementioned conflicts justify the grant of certiorari to review the judgment below.

III. THE SIXTH CIRCUIT COURT OF APPEALS ERRONEOUSLY INTERPRETED THIS COURT'S HOLDINGS IN *GREEN* v. *UNITED STATES*, 355 U.S. 184 (1957) AND *PRICE* v. *GEORGIA*, 398 U.S. 323 (1970) IN EXTENDING DOUBLE JEOPARDY CLAUSE PROTECTIONS IN *MULLREED* v. *KROPP*, 425 F.2d 1095 (6th Cir., 1970), and *RIVERS* v. *LUCAS*, 477 F.2d 199 (6th Cir.) vacated, 414 U.S. 896 (1973).

In *Mullreed* v. *Kropp*, *supra*, and its progeny, *Rivers* v. *Lucas*, *supra*, the Sixth Circuit Court of Appeals cited *Green* v. *United States*, *supra*, and *Price* v. *Georgia*, *supra*, as authority for holding that when a defendant succeeds in vacating his plea conviction to a lesser offense, the double jeopardy clause limits the prosecution to proceeding on the plead-to lesser offense.

In *Mullreed*, the Court reasoned:

> The practical effect of his guilty plea had the same impact upon Mullreed as a jury verdict of guilty would have had.
>
> . . . .
>
> The difference between this case and *Benton* v. *Maryland*, *supra*, 395 U.S. 784 . . . . is that in that case a jury had made an express acquittal. In *Green* v. *United States*, *supra*, 355 U.S. 184 . . . . the verdict was silent as to the first degree murder charge, upon which the Court held that the defendant had been acquitted. The State urges these distinctions of constitutional dimensions. We think not. We hold that the situation here in substance is not distinguishable from *Benton* and *Green*. *Mullreed* v. *Kropp*, *supra*, at 1101-1102.

In *Rivers* v. *Lucas*, *supra*, the Court of Appeals reaffirmed the *Mullreed* extension of double jeopardy clause protections:

> Shortly after *Mullreed* v. *Kropp*, *supra*, was announced, the Supreme Court . . . rendered its decision in *Price* v. *Georgia*, 398 U.S. 323 . . . . Adopting the continuing jeopardy theory as described in *Green* v. *United States*, *supra*, the Court held that a jury's conviction of manslaughter implied an acquittal of the charge of murder and the defendant could not again be subjected to the hazard of a murder conviction following reversal of the manslaughter conviction.
>
> . . . .
>
> We affirm that there is implicit in a court's acceptance of a plea to an included offense a determination that the right to prosecute the defendant on the more serious offense with which he is charged has been relinquished. The effect of the entire transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge. *Rivers* v. *Lucas*, *supra*, at 202.

Cross-Petitioners contend that this Court's decisions in *Green* v. *United States*, *supra*, and *Price* v. *Georgia*, *supra*, do not support the Sixth Circuit's extension of double jeopardy clause protections to the plea bargain remand situation in *Mullreed* and *Rivers*.

In *Green*, this Court pointed out:

> Green was in direct period of being convicted and punished for first degree murder at this first trial. *Green* v. *United States*, *supra*, at 190.

And in *Price* this Court explained the concept of jeopardy:

> The twice put in jeopardy language of the Constitution thus relates to a potential, i.e., the *risk* that an accused for a second time will be convicted of the "same offense" for which he was initially *tried*. *Price* v. *Georgia*, *supra*, at 326 (emphasis added).

In pleading guilty to manslaughter, Cross-Respondent Rivers did not experience the risk of conviction on the original felony-murder charge, and this Court has clearly stated that jeopardy is that risk of conviction.

The erroneous application by the Court of Appeals of this Court's interpretation of the double jeopardy clause justifies the grant of certiorari to review the judgment below.

IV. THE EXTENSION OF DOUBLE JEOPARDY CLAUSE PROTECTIONS BY THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *SANTOBELLO* v. *NEW YORK*, 404 U.S. 257 (1971).

In *Mullreed v. Kropp*, *supra*, and *Rivers v. Lucas*, *supra*, the Court of Appeals held that the double jeopardy clause prohibits reprosecution on the original charge after a court has accepted a plea to a lesser offense.

In *Santobello v. New York*, *supra*, when a defendant moved after sentencing to withdraw his guilty plea, this Court stated:

> If the state court decides to allow withdrawal of the plea [to the lesser offense], the Petitioner will, of course, plead anew to the original charge on two felony counts. *Id.* at 263 n.2.

There is a clear conflict between these two holdings: under *Santobello* a defendant who succeeds in withdrawing his plea is faced with the original charge, while under *Mullreed* and *Rivers*, a similarly situated defendant can only be charged with the lesser plead-to offense.

Further, the *Mullreed-Rivers* precedent seriously obstructs the normal functioning of the plea bargain process which this Court has termed "an essential component of the administration of justice". *Santobello v. New York*, *supra*, at 260. In the instant case, the effect of the *Mullreed-Rivers* precedent was to rewrite the prosecutor's original offer to create a result neither of the parties contemplated at the time the plea bargain was negotiated: that the defendant would stand trial on a charge of not more than manslaughter. If the prosecutor is unable to bargain on equal terms, he may be less likely to utilize the plea bargain process.

The chaotic impact of the *Mullreed-Rivers* precedent on the plea-bargain process is further highlighted in the instant case because the prosecution is unable to bring Cross-Respondent Rivers to trial on the manslaughter charge. The facts justifying the felony-murder charge, involvement in a larceny wherein a killing took place, will not support a conviction for manslaughter. Manslaughter is not a lesser included offense of felony murder. At the same time, the law of Michigan permits the court to accept a plea if the factual basis supports a finding of the defendant's guilt of the original charged offense (felony-murder) or the offense to which he is pleading (manslaughter). Michigan General Court Rules 785.7(3). In pleading guilty to manslaughter, Cross-Respondent Rivers admitted facts supportive of a finding of guilt of felony-murder. Thus, the *Mullreed-Rivers* precedent unnecessarily limits the number of plea alternatives available to the prosecution. This unjustifiable

one-sided intrusion by the Court of Appeals into the plea-bargain process conflicts with this Court's approval of properly administered plea bargaining in *Santobello*.

The conflict between the *Mullreed-Rivers* precedent in the Sixth Circuit and this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), and the further deleterious effect of the *Mullreed-Rivers* precedent on the plea bargain process justifies the grant of certiorari to review the judgment below.

V. THE DISTRICT JUDGE ERRONEOUSLY FORECLOSED ANY EXERCISE OF DISCRETION, HOLDING THAT UNDER RULE 60, FEDERAL RULES OF CIVIL PROCEDURE, THE 1972 ORDER WAS FINAL, "BINDING ON THE PARTIES AND MAY NOT BE SET ASIDE."

The Federal District Court 1975 Memorandum Opinion states that the court refused to consider a modification or rescission of its 1972 Order on the ground that under Rule 60, Federal Rules of Civil Procedure, it "may not be set aside":

> The arguments presented by respondents in their current motion are different than those advanced when the case was first before the court. Specifically, the Prosecutor now expresses his willingness to eliminate the chill on Rivers' right to appeal by allowing him to again plead guilty to manslaughter . . . Even though *this* is a *persuasive argument.*[3] It *comes too late*. The 'law of this case' is that the United States Court of Appeals for the Sixth Circuit dismissed the appeal in 1973 and, accordingly, *the June 14, 1972 Order of this court became the final order. It is now binding on the parties and may not be set aside. See Rule 60, Fed R Civ P.*

[3] Were this a case of first impression . . . this court would find great merit in respondent's present position.

Rivers v Lucas, District Court Order, May 7, 1975. (App. C, P. 25)

Cross-Petitioners contend that the District Court erroneously held that Rule 60, F.R. Civ. P. precludes relief from its 1972 Order. Rule 60 (b) F.R. Civ. P. provides:

> "(B) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment, order, or proceeding was entered or taken.

Thus, Rule 60 required the District Court to exercise discretion in deciding whether Cross-Petitioners' motion qualified for relief, and the district judge's action in foreclosing any exercise of discretion requires reversal of this order.

This error justifies the grant of certiorari to vacate the 1975 District Court order. However, Cross-Petitioners urge that if this court vacates said order, the case should not be remanded to the Sixth Circuit for further determinations since those proceedings will be governed by the *Mullreed-Rivers* precedent. Cross-Petitioners pray that this court proceed to the merits and determine the validity of the *Mullreed-Rivers* precedent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Wayne County, Michigan
Prosecuting Attorney

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July 1, 1976

APPENDIX A

No. 75-1853
No. 75-1854

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed February 20, 1976)

Seanarfis Rivers, Petitioner-Appellee
and Cross-Appellant

v.

William Lucas and The Honorable Henry Heading,
Respondents-Appellants and Cross-Appellees

ORDER

Before: McCree, Miller and Lively, Circuit Judges.

This is an appeal from an order granting conditional habeas corpus relief. Upon consideration of the entire record before the court together with the briefs and oral arguments it is concluded that the judgment of the district court should be affirmed on appeal and cross-appeal.

Wherefore it is Ordered that the judgment of the district court be and it hereby is affirmed.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

APPENDIX B

NO. 75-1853
NO. 75-1854

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed May 25, 1976)

Seanarfis Rivers, Petitioner-Appellee
and Cross-Appellant

v.

William Lucas and The Honorable Henry Heading
Respondents-Appellants and Cross-Appellees

ORDER

Before: McCree, Lively and Engel, Circuit Judges.

Less than a majority of the judges in active service having requested a rehearing en banc, the petition for rehearing filed herein has been referred to a panel of the court for disposition. Upon consideration of the petition for rehearing the court concludes that it should be, and it hereby is denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

Judges Celebrezze and McCree voted in favor of rehearing en banc.

APPENDIX C

ORDER OF THE FEDERAL DISTRICT COURT MAY 7, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

At a session of said court held in the Federal Building, Detroit, Michigan, on May 7, 1975.

Present: Hon. John Feikens, United States District Judge.

This matter having come before the court on respondents' motion, the court being fully advised, and for the reasons set forth in a Memorandum Opinion of even date,

IT IS ORDERED that petitioner be released from all custody unless the People reduce the charge on the information against petitioner to not more than manslaughter and commence trial on such information within ninety days.

John Feikens
United States District Judge.

FEDERAL DISTRICT COURT MEMORANDUM OPINION GRANTING WRIT MAY 7, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

On June 14, 1972, this court granted Seanarfis Rivers' habeas corpus petition and ordered respondents (the Sheriff of Wayne County, Michigan, and a judge of the Recorder's Court for the City of Detroit) to release him or to afford him a trial on a charge not greater than manslaughter. He had earlier been charged with murder, as a result of a plea bargain, he pleaded guilty to manslaughter, but then was successful in having that plea vacated because it was defectively taken. The Wayne County, Michigan Prosecutor then sought to try him on the original murder charge. This court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit, 477 F.2d 199 (1973). Subsequently, the United States Supreme Court vacated the judgment of the United States Court of Appeals for the Sixth Circuit and remanded the case for a consideration of the question of mootness in light of *People v. McMiller*,[1] 389 Mich. 425 (1973). On December 10, 1973, the United States Court of Appeals for the Sixth Circuit issued a second order in which it noted that under *McMiller, supra:*

> "Rivers will now be charged with 'not more than manslaughter', the condition originally prescribed by the district court as an alternative to relase from custody . . . . "

[1] *McMiller*, decided after the original habeas petition was filed in this case, reached a similar conclusion, but for a different reason — "upon the acceptance of a plea of guilty, *as a matter of policy*, the state may not thereafter charge a higher offense arising out of the same transaction".

Accordingly, the appeal was dismissed. Petitioner Rivers now seeks a second writ claiming that the prosecutor seeks again to try him for murder. He asks release from all custody.[2]

Respondents admit that they seek to try petitioner for murder unless he again pleads guilty to manslaughter, and ask for a "clarification of status" to make this possible.

The arguments presented by respondents in their current motion are different than those advanced when the case was first before the court. Specifically, the prosecutor now expresses his willingness to eliminate the chill on Rivers' right to appeal by allowing him to again plead guilty to manslaughter. Thus, he argues, Rivers would be no worse off than he was before entering his original plea. *See* Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure*, 69 Nw. U.L. Rev. 663 (1975). Even though this is a persuasive argument,[3] it comes too late. The "law of this case" is that the United States Court of Appeals for the Sixth Circuit dismissed the appeal in 1973 and, accordingly, the June 14, 1972 order of this court became the final order. It is now binding on the parties and may not be set aside. *See* Rule 60, Fed. R. Civ. P.

[2] Rivers has been admitted to bail.

[3] The author of that article, who is the assistant prosecutor in this case, states that petitioner's due process rights are fully met by giving him the option to decide whether to again plead to the charge of manslaughter or to stand trial on the charge of murder. He argues that only Rivers may decide that; he notes that in its earlier posture in the case this decision was made by the prosecutor. Were this a case of first impression and had not Rivers' situation languished for many months while the state authorities were at loggerheads on this issue (and apparently still are), this court would find great merit in respendents' present position.

While the court is impressed with respondent's analysis of the case on the merits, there is an elusive quality to its procedural argument. They argue that this court's order was rendered moot by *McMiller*, and then they claim that *McMiller* may be good law and ask the opportunity to litigate that question. If respondents did not believe *McMiller* to be dispositive, they, it seems, would have sought certiorari from the United States Court of Appeals' second order.

Respondents argue that the comity doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) prevents this court from interfering. But this court is not seeking to enjoin state action, it only seeks to enforce its original order, a mandate which has gone unheeded for at least sixteen months.

Accordingly, this court will order respondents to either try Rivers for not more than manslaughter within ninety days or release him.

John Feikens,
United States District Judge

Dated: Detroit, Michigan, May —, 1975.

APPENDIX D

ORDER OF THE UNITED STATES SUPREME COURT OCTOBER 15, 1973

LUCAS v. RIVERS, 414 U.S. 896 (1973)

William Lucas and Henry Heading, petitioners,
v.
Seanarfis Rivers

No. 73-163.

Facts and opinion. D.C., 345 F. Supp. 718; 477 F.2d 199.

Oct. 15, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Motion to dispense with printing respondent's brief in opposition and petition for writ of certiorari granted. Judgment vacated and case remanded to the Court of Appeals for consideration of the question of the mootness in light of *People v. McMiller*, 389 Mich. 425, 208 N.W.2d 451 (1973).

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 10, 1973)

Seanarfis Rivers, Petitioner-Appellee
v.
William Lucas and The Honorable Henry Heading,
Respondents and Appellants.

No. 72-1792

Before: Weick, Miller and Lively, Circuit Judges.

The Supreme Court of the United States *vacated the judgment* of this court entered on April 24, 1973 and reported at 477 F.2d 199, and remanded the cause for consideration of the *question of mootness* in the light of *People v. McMiller*, 389 Mich 425, — N.W. 2d — (June 18, 1973). In its decision in *People v. McMiller, supra*, the Supreme Court of Michigan declared that as a matter of policy the State may not charge a defendant in a criminal case who has pleaded guilty to a lesser offense included in the indictment and thereafter successfully appealed the judgment based on such guilty plea with a higher offense arising out of the same transaction. Accordingly, the petitioner Rivers will now be charged with "not more than manslaughter," the condition originally prescribed by the district court as an alternative to release from custody, and affirmed by this court.

It therefore appears that the only issue before this court is now moot and, accordingly, the appeal in this action is dismissed pursuant to Rule 8, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX F

OPINION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, APRIL 24, 1973

Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1973)

Seanarfis Rivers, Petitioner and Appellee,
v.
William Lucas and The Honorable Henry Heading,
Respondents and Appellants.

No. 72-1792

Argued Feb. 9, 1973.

Decided Aprii 24, 1973.

Before Weick, Miller and Lively, Circuit Judges.

Lively, Circuit Judge.

This is an appeal from a District Court order which granted a conditional writ of habeas corpus to Seanarfis Rivers who was in custody of the State of Michigan. The condition is that the prisoner be released unless the State shall reduce the charge against him to "not more than manslaughter." The opinion of the District Court is reported at 345 F. Supp. 718. Pursuant to Rule 10(d), Federal Rules of Appellate Procedure, the parties filed the following agreed statement of the case:

On October 19, 1970, an Information was filed in the Recorder's Court for the City of Detroit charging Petitioner-Appellee with the offense of Murder in the First Degree in Perpetration of a Larceny (Michigan Compiled Laws os [sic] 1948, 750.316 as amended by PA 1969 No. 331). Petitioner-Appellee was not charged with being the actual killer. On January 19,

1971, Petitioner-Appellee entered a plea of guilty to the offense of Manslaughter, which plea was accepted by the Recorder's Court. On February 9, 1971, Petitioner-Appellee was sentenced to be committed to the State Correction Commission to serve not less than fourteen years nor more than fifteen years.

On June 28, 1971 the Michigan trial court denied Petitioner-Appellee's Motion to Set Aside Plea of Guilty and for a New Trial and on that same date Petitioner-Appellee filed a Claim of Appeal in the Michigan Court of Appeals.

On March 23, 1972, the Michigan Court of Appeals ordered the conviction of Petitioner-Appellee reversed and remanded the cause to the Recorder's Court for further proceedings. The sole authority cited in support of the Order by the Michigan Court of Appeals was the case of People v. Jaworski, 387 Mich. 21, 194 N.W. 2d 868 (1972).

On April 18, 1972, Petitioner-Appellee filed with the Recorder's Court a Motion to Quash Information or to Reduce Charge to Manslaughter. This motion was denied by the Recorder's Court on May 11, 1972. On May 12, 1972 Petitioner-Appellee filed in the Michigan Court of Appeals an Emergency Application for Leave to Appeal from the denial of that motion and for Immediate Consideration and Motion for Stay of that Order and for Immediate Consideration. The Michigan Court of Appeals on May 15, 1972 granted Immediate Consideration and denied both the Stay and Leave to Appeal. On May 12, 1972 Petitioner-Appellee also filed in the Michigan Supreme Court Emergency Application for Leave to Appeal from that Order of the trial court, Motion to Bypass the Court of Appeals of Michigan, Motion for Immediate Consideration and Motion for Stay of Proceedings. On May 18, 1972, the Michigan

Supreme Court granted Immediate Consideration and bypass and denied Leave to Appeal and Stay of Proceedings.

On May 23, 1972, Petitioner-Appellee filed Application for a Writ of Habeas Corpus in the United States District Court, Eastern District of Michigan, Southern Division, pursuant to which the Honorable John Feikens on June 14, 1972 ordered that the appellant be released from custody unless the State reduces the charge on the Information to no more than Manslaughter.

From the Order of the U.S. District Court, the respondents named therein filed their Notice of Appeal to the U. S. Court of Appeals for the Sixth Circuit on July 3, 1972.

On July 13, 1972, Petitioner-Appellee filed a Motion to Set Bond Pending Trial in the Recorder's Court for the City of Detroit which was denied on July 18, 1972. On July 21, 1972 Petitioner-Appellee filed in the Michigan Court of Appeals Emergency Application for Leave to Appeal from that Order and for Immediate Consideration and to Set Bond. On July 27th the Michigan Court of Appeals granted the Motion for Immediate Consideration and denied the Motion to Set Bond and the Application for Leave to Appeal. On August 3, 1972 Petitioner-Appellee filed in the Michigan Supreme Court Emergency Application for Leave to Appeal, for Immediate Consideration, and to Set Bond. On August 24, 1972 the Michigan Supreme Court granted the Emergency Application for Leave to Appeal and ordered Petitioner-Appellee admitted to bail pending a determination of the instant appeal.

The appellants ask that we reconsider and overrule Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970), wherein we directed that habeas corpus relief be granted a prisoner being held under circumstances

similar to those in this case. The facts in the two cases are not exactly parallel in that the petitioner Mullreed, at the time of his plea, was charged with two offenses in separate counts, and pled guilty to the lesser one; whereas appellee Rivers was charged in a single count with one offense and was permitted to plead to a lesser included offense. In *Mullreed* this Court held that the constitutional prohibition against double jeopardy would be violated if one who successfully appealed from a guilty plea to the lesser charge were permitted to be tried subsequently on the more serious charge contained in the indictment.

The original not guilty plea of Mullreed to the more serious charge remained in effect at the time of his guilty plea to the lesser charge was accepted. The crucial factor on the issue of double jeopardy was held to be "the State's relinquishment of its rights, or its refusal, to prosecute on count one" (the more serious charge). 425 F.2d at 1099. However, the addition of the second count charging the lesser offense was not essential to the outcome, since the charges arose out of the same occurrence and the lesser offense of unarmed robbery was necessarily included in the charge of armed robbery. In the present case, the charge of manslaughter is a lesser offense included in the charge of murder. Thus the *Mullreed* rule applies even though appellee Rivers was only charged with one offense.

[1] In Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199 (1957), the Supreme Court discussed the history and development of the double jeopardy plea. It was pointed out that a defendant can be tried a second time for the *same offense* following a successful appeal from a prior conviction. This does not constitute double jeopardy, either on the theory that this defense is waived

when the convicted person seeks to set his conviction aside, or on the theory that his former jeopardy is continued until all proceedings with respect to the first trial come to an end. He may even receive a more severe sentence on retrial. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969). The situation is different, however, when the jury has failed to find a defendant guilty on a more serious charge and convicted him on a lesser one. Then, when he is successful in overturning the conviction, he may not be put in jeopardy again for the more serious charge, though he may be tried again on the same less serious offense, Green v. United States, *supra*, at 191, 78 S.Ct. 221. This Court held in *Mullreed* that for purposes of testing a double jeopardy plea there is no difference between the jury's refusal to convict on the more serious charge and a court's implicit refusal to do so when it accepts a guilty plea to a lesser included offense.

Shortly after Mullreed v. Kropp, *supra*, was announced, the Supreme Court, per Chief Justice Burger for a unanimous court (with one justice not participating) rendered its decision in Price v. Georgia, 398 U.S. 323, 90 S. Ct. 1757, 26 L.Ed. 2d 300 (1970). Adopting the continuing jeopardy theory as described in Green v. United States, *supra*, the Court held that a jury's conviction of manslaughter implied an acquittal of the charge of murder and the defendant could not again be subjected to the hazard of a murder conviction following reversal of the manslaughter conviction. The Court emphasized that the prohibition against double jeopardy is not one against being twice punished, but is concerned with the *risk* or hazard of conviction of an offense of which a person has been acquitted.

[2] We affirm that there is implicit in a court's acceptance of a plea to an included lesser offense a determination that the right to prosecute the defendant on the more serious offense with which he is charged has been relinquished. The effect of the entire transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge. Only if this is true may a defendant seek review of his conviction without being faced with the "incredible dilemma" of choosing between a legal right of appeal and the possibility that success will revive the hazard of conviction of a charge which the prosecution had willingly abandoned in exchange of his plea. Mullreed v. Kropp, *supra*, at 1102. The continuation principle of jeopardy makes it possible for appellee Rivers to be tried again for the same offense of which he was convicted by his guilty plea (manslaughter), but his successful appeal did not open the way for him to be once again subjected to the risk of a prosecution for murder.

The appellants contend that Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495; 30 L.Ed. 2d 427 (1971), overruled the Court's decision in Mullreed v. Kropp, *supra*. Santobello dealt with "plea bargaining" and the rights of a defendant where the prosecution reneges on its agreement after obtaining a guilty plea. Since the Supreme Court remanded for consideration by the trial court of two alternative procedures for correcting the error, no consideration of double jeopardy was required. In stating that the defendant would plead anew to the original charge on two counts if the trial court should permit him to withdraw his original guilty plea, the Court did not say, or even intimate, that he could not plead the constitutional prohibition against double jeopardy as a bar

to prosecution on the more serious of the two counts. The language of the Supreme Court places no limitation on the nature of the plea which a defendant in such a situation may interpose.

[3] The appellants contend that the appellee Rivers did not exhaust his state remedies before seeking federal habeas corpus relief. The steps he has taken in the Michigan courts are set forth in the statement of the case. The only thing left for him to do in the state courts is to submit to trial on the murder charge. Since exposure to the risk of conviction is the very thing he is seeking to avoid, this step is not necessary for a complete exhaustion of state remedies where freedom from double jeopardy is the right sought to be preserved. As District Judge Feikens pointed out in his opinion, there is a valid consideration of judicial economy. Even if appellee were tried for murder and found guilty only of manslaughter, a new trial would be necessary, because the second jeopardy on a murder charge would not be harmless error. Price v. Georgia, *supra*, at 331, 90 S.Ct. 1757.

While the Supreme Court of Michigan has not ruled on the critical question in this case, the Court of Appeals of Michigan has consistently refused to follow Mullreed v. Kropp, *supra*.[1] In the instant case, after the trial court had refused to quash the information or reduce the charge to manslaughter, the Court of Appeals of Michigan denied leave to appeal "for the reason that no persuasive basis therefor is presented to the Court."

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[1] E. g., People v. Harper, 32 Mich. App. 73, 188 N.W.2d 254 (1971), where the Court said: "We hereby express total disagreement with the *Mullreed* opinion. It ignores the importance of the plea milieu. Compare, Ward v. Page, *supra*. We agree, rather, with every contention raised on behalf of the State of Michigan in *Mullreed* and think the Sixth Circuit's opinion should not and need not be followed in Michigan . . ." 188 N.W. 2d at 258.

Thereafter, the Supreme Court of Michigan granted bypass and denied leave to appeal without giving a reason. The appellee has presented his grievance to the courts of Michigan and they have had an opportunity to adjudicate his claim of a constitutional violation. This is sufficient to satisfy the requirement of 28 U.S.C. §2254 that every available state remedy shall be exhausted. Fay v. Noia, 372 U.S. 391; 83 S. Ct. 822, 9 L.Ed. 2d 837 (1963).

[4, 5] The appellants also maintain that since appellee has not been convicted he is not being held "pursuant to the judgment of a State Court" as required by Section 2254. This argument misconceives the nature of habeas corpus, which is an original civil remedy to secure the petitioner's liberty, not another state of the previous criminal proceedings. Fay v. Noia, *supra*, at 423-424, 83 S. Ct. 822. Appellee is being held pursuant to a judgment of the Recorder's Court of Detroit which denied his motion to quash or reduce the charge to manslaughter. The statute does not require a final judgment of conviction. Furthermore, it was stated in Fay v. Noia, *supra*, that this statutory requirement is not jurisdictional: "The jurisdictional prerequisite [in the lower federal courts] is not the judgment of a state court but detention simpliciter." 372 U.S. at 430, 83 S.Ct. at 844.

[6] It is also contended by the appellants that the granting of habeas corpus to a state prisoner being held for trial amounts, in effect, to issuing an injunction to stay state proceedings in contravention of 28 U.S.C. §2283. The cases cited by appellants do not support their argument, and we have found no Supreme Court decision which holds that pretrial habeas corpus relief is the

equivalent of an injuction to stay proceedings in a state court. We decline to follow Drury v. Cox, 457 F.2d 764 (9th Cir., 1972), to the extent that it equated the two types of action.

The Court has considered the arguments of appellants and the cases cited by them, including Ward v. Page, 424 F.2d 491 (10th Cir., 1970), *cert. denied*, 400 U.S. 917, 91 S. Ct. 177, 27 L.Ed 2d 157 (1970, and United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914, 91 S.Ct. 1396, 28 L.Ed. 2d 656 (1971). We continue to adhere to our decision in Mullreed v. Kropp, *supra*.

The order of the District Court is affirmed.

APPENDIX G

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT JUNE 14, 1972

(Rivers v Lucas, 34. F. Supp 718 (E.D. Mich. 1972)

(Eastern District of Michigan, Southern Division)

In October of 1970, an information was filed charging petitioner with murder in the first degree in perpetration of a larceny. On January 19, 1971, he pleaded guilty to the lesser offense of manslaughter. When Rivers was given a substantial prison sentence, he appealed.

In March 1972, the Court of Appeals reversed his conviction on the ground that he had not been advised of his right against self-incrimination, citing *People* v *Jaworski*, 387 Mich. 21 (1972).

After remand, the State indicated its intention to proceed on the original information charging murder. Rivers moved to reduce the charge to manslaughter, relying on the authority of *Mullreed* v *Kropp*, 425 F.2d 1095 (6th Cir. 1970). This motion was denied. Petitioner then filed an application for leave to appeal to the Michigan Court of Appeals, which court denied relief. He then appealed to the Supreme Court, which court also denied relief. Petitioner thereupon filed a petition here for a writ of habeas corpus.

There is a clear conflict between the rulings of the Sixth Circuit Court of Appeals and Michigan courts on the issue raised by petitioner. In *Mullreed* v *Kropp*, *supra*, the United States Court of Appeals held that when a plea to a lesser included offense is accepted, this constitutes a deliberate decision by the State to relinquish its right to proceed on the greater charge and jeopardy attaches. That court stated:

> "We agree that in legal effect the first proceeding is a nullity. The consequences of this are to make retrial upon the same count, robbery unarmed, entirely permissible. This is the rule of United States v. Ball, *supra*, 163 U.S. 662, . . . The same would be true if this had been a jury proceeding subsequently overturned on constitutional grounds. Nonetheless, the holding of Green v. United States, *supra*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 199, is that the conviction on the lesser, or more properly, refusal to convict on the greater, would bar a subsequent prosecution and sentence on the greater charge." 425 F.2d at 1101.

The most recent pronouncement of the Michigan Court of Appeals in *People* v *McMiller*, 38 Mich App 99 (1972), expresses strong disagreement with that ruling:

> " 'We hereby express total disagreement with the Mullreed opinion. It ignores the importance of the plea millieu.' " quoting People v. Harper, 32 Mich App 73 (1911), at 100, 101.

Nonetheless, the law in this circuit is clear; the State may not try petitioner for murder, but may proceed to trial only on the lesser offense of manslaughter.

The State argues that to grant relief now is premature since Rivers has not yet been tried for murder. But delay in this case would be futile. It would thwart principles of judicial economy to require Rivers to be tried on the charge of murder and if convicted to exhaust his appeal procedures again, only to return years hence on the same issue. Therefore,

It is Ordered that the petitioner be released from custody unless the State reduces the charge on the information against petitioner to not more than manslaughter.

/s/ John Feikens
United States District Judge

Dated: June 14, 1972
Detroit, Michigan

APPENDIX H

MICHIGAN COMPILED LAWS

750.316 First degree murder

Sec. 316. All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.